United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

JANUARY TERM, 1910.

No. 2088.

6033

JOHN E. BRADY, APPELLANT,

vs.

CHESAPEAKE AND POTOMAC TELEPHONE COMPANY, A CORPORATION.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED NOVEMBER 19, 1909.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 14, 1909.

In the Court of Appeals of the District of Columbia.

No. 2088.

JOHN E. BRADY, Appellant,
vs.
CHESAPEAKE AND POTOMAC TELEPHONE COMPANY, a Corporation.

---

a Supreme Court of the District of Columbia.

Law. No. 50664.

JOHN E. BRADY, Plaintiff,
vs.
CHESAPEAKE & POTOMAC TELEPHONE COMPANY, a Corporation, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration.*

Filed Jun- 11, 1909.

In the Supreme Court of the District of Columbia.

Law. No. 50664.

JOHN E. BRADY, Plaintiff,
vs.
CHESAPEAKE & POTOMAC TELEPHONE COMPANY, a Corporation, Defendant.

The plaintiff, John E. Brady, sues the defendant, the Chesapeake & Potomac Telephone Company, a corporation, having its principal office and place of business in the District of Columbia, for that heretofore, to wit, April 2nd, 1908, and at the time of the grievances hereinafter mentioned, the sai- defendant company was engaged in

doing a general telephone business in the District of Columbia, and the neighboring States of Maryland and Virginia; that at the time aforesaid said defendant company was engaged in constructing new lines for the extension of its business in the said State of Virginia, and while so engaged, had in its employ as one of its laborers, said plaintiff, who was digging, or helping to dig the holes necessary for the erection of said defendant company's telephone poles; that it then and there became and was the duty of said defendant company, by and through its proper foreman, agent and representative, to exercise reasonable care in furnishing to said plaintiff a
2 safe place to work; but notwithstanding its said duty in this regard, said defendant company, through its said foreman, agent or representative, became and was negligent, in that while said plaintiff was digging one of the anchor holes for anchoring or fastening one of its telephone poles in position, through ground—the dangerous character of which was known to said defendant company, or which should have been known to said defendant company by the exercise of reasonable care on its part, but which was not known to the said plaintiff—by and with the aid of a long handled spoon from his position on top of the bank in which said hole had to be sunk, he was ordered and directed by said defendant company's foreman to get down into the hole and dig the same from that position with a shovel to its required depth of some six feet, without said defendant company's foreman shoring up the sides of said hole, or in any manner seeking to protect said plaintiff from any sudden caving in of the sides of said bank as he was digging and sinking said hole; whereby and by reason of which said negligence, said plaintiff, himself in the exercise of due care, when he had dug said hole to a depth of some five feet, was caught by the bank falling and caving in upon him, without warning, and was thereby crushed and permanently injured, his collar bone dislocated and permanently injured, and he was as well shocked, bruised, contused, hurt, wounded and injured, and became and was sick, sore lame and disordered, and so remained for a long space of time, to wit, hitherto, and will so remain in the future, during all of which time the plaintiff suffered and will continue to suffer great pain, mental distress and anguish from the injuries and shock thus occasioned his
3 whole system, to his damage in, to wit, $3900; and further by reason thereof has been, and will be in the future, hindered, prevented and incapacitated, from performing his work, or in carrying on the heavy laboring work that he has been accustomed to doing, to the special damage of said plaintiff in, to wit, $1000, and has been further specially damaged thereby, by being forced to lay out and expend a large sum of money for doctor's services in, to wit, $75, and a sum of money for medicines, drugs, liniments, and ointments in, to wit, $25 in and about his endeavor to be healed and cured of the said bruises, wounds, hurts, cuts and injuries, so as aforesaid occasioned, in all to the total damage of said plaintiff, $5000, which amount he claims of the said defendant company, besides costs.

LEONARD P. MATHER,
Att'y for Pl'ff.

Notice to Plead.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of service hereof; otherwise judgment.

LEONARD P. MATHER,
Att'y for Pl'ff.

4 *Plea to Declaration.*

Filed Jun- 22, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 50644.

JOHN E. BRADY, Plaintiff,
vs.
CHESAPEAKE & POTOMAC TELEPHONE COMPANY, a Corporation, Defendant.

The Chesapeake & Potomac Telephone Company, the defendant in the above entitled cause, for a plea to the declaration of the plaintiff, John E. Brady, heretofore filed therein, says that it is not guilty in the manner and form therein alleged.

R. ROSS PERRY, SR.,
Attorney for Defendant.

Joinder of Issue.

Filed Jun- 22, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 50644.

JOHN E. BRADY, Plaintiff,
vs.
CHESAPEAKE & POTOMAC TELEPHONE COMPANY, a Corporation, Defendant.

Plaintiff joins issue on the Plea of the defendant heretofore filed in this cause.

LEONARD P. MATHER,
Attorney for Plaintiff.

5 *Memorandum.*

October 6, 1909.—Verdict for defendant.

Supreme Court of the District of Columbia.

TUESDAY, *October* 12, 1909.

Session resumed pursuant to adjournment Mr. Justice Wright presiding.

At Law. No. 50664.

JOHN E. BRADY, Pl't'f,
vs.
CHESAPEAKE & POTOMAC TELEPHONE COMPANY, a Corporation, Def't.

The time within which to move for a new trial having expired judgment on verdict is ordered.

Therefore it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day, and recover against the plaintiff the costs of its defense to be taxed by the Clerk and have execution thereof.

The plaintiff notes an Appeal in open Court to the Court of Appeals of the District of Columbia, and upon motion the penalty of the bond for costs on said appeal is hereby fixed in the sum of one hundred dollars, ($100).

October 20, 1909.—Appeal bond filed.

Supreme Court of the District of Columbia.

WEDNESDAY, *November* 3, 1909.

Session resumed pursuant to adjournment. Mr. Justice Wright presiding.

* * * * * * *

At Law. No. 50664.

JOHN E. BRADY, Pl't'f.
vs.
THE CHESAPEAKE & POTOMAC TELEPHONE COMPANY, Def't.

Now comes here the plaintiff by his Attorney and prays the Court to sign, seal and make part of the record, his bill of exceptions taken during the trial of this cause, now for then, which is accordingly done.

7

Bill of Exceptions.

Filed Nov. 3, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 50664.

JOHN E. BRADY, Plaintiff,
vs.
THE CHESAPEAKE & POTOMAC TELEPHONE COMPANY, Defendant.

The above entitled cause came on for hearing at this term of the Court before Mr. Justice Wright and a jury.

And thereupon after the said jury had been duly sworn the plaintiff to maintain the issues on his part joined gave in evidence the testimony of himself as follows:—

"I went to work for the Telephone Company the first Monday after New Years, 1908, and was in the service of the Company from that time until the second day of April, 1908. I worked as a ground man and first applied for work to Mr. McKenzie who was at some work a little the other side of Bennings Road going out to the District Line. I then went to the office of the Company and Mr. McKenzie told me I could have a job. In working I would go first to one foreman and then to another but I think it was Mr. McKenzie who said I had to work for Mr. Lusby for those two weeks over in Alexandria County. Mr. Lusby was a foreman under Mr. McKenzie and was in charge of the Company's work over in Alexandria County. That day he had six men under him. The accident to me happened between three and four o'clock on April 2, 1908. Before the accident I had been digging holes. Mr. Lusby had sent me to work

8 on the hole in which I was hurt and he himself was right there around the hole while I was working. It was an anchor hole about two feet wide, six feet long and six feet deep which I was to dig. The hole was right beside the bank of a railroad and one side of the bank was a good deal higher than the hole. I don't know exactly how high the bank was above the hole but I guess it was about six feet. I didn't measure it. The ground was a little sandy, a kind of a mixed soil, a little clay and sandy. And after I got down there a little the water began to come into the hole from the bottom and sides. There was water up above my shoetops. At the time the bank caved in I guess I had dug the hole about five feet and the water then in the bottom was over my shoetops and half way from my ank-e to my knee. No one told me anything about any danger and I didn't think it was dangerous. The bank wasn't shored at all as I saw. I just went down and went to digging. They didn't put anything up there to prevent it from falling if it wanted to fall. I don't know how much of the bank caved in on me because it came in so quick. I was pulled out by Mr. Lusby, Knox's driver and two other men and was sent right in to the emergency Hospital. I stayed there that evening while the doctor dressed my shoulder and then

went down on a car to my boarding house. I made four daily visits to the Hospital in succession after that and four more subsequently, the last on April 30th. I also paid two visits besides to Doctor Miller's office on Seventh Street. I can't lift as much as I could with that arm and I can't handle that shoulder. It hurts me in that shoulder to handle it in that position (indicating); it feels stiff up in there (indicating). I have the knot there now. For three nights
9 and days the pain was very severe. When I am using the shoulder to raise anything up like that (indicating) it feels like a string comes right across and pulls down on me; and in using it that way it pains me at night if I have to work any with a hoe."

On cross-examination the plaintiff further testified as follows:—"I am now working in Prince George's County for $12. a month and my board and washing and have been there since the first day of April. Before that I worked a little by the day for my cousin for 75 cents a day and board. The first work I did after the accident was somewhere about the third of the following August. While I was working for the Telephone Company I got $1.62 a day and worked every day except Sundays. Before that I got $1.75 a day as a stable boy; before that $14. a month on a farm and my horse kept. As a ground man of the Telephone Company my duty was to do anything they called on me for on the ground; to hand up wire or bolts, or dig holes or help set bolts. I had been digging anchor holes a good deal. As a rule my work was digging anchor holes and pole holes. I never dug any before I went with the company but learned to dig them there. The only holes I dug before that were port holes not more than two feet deep. I am thirty-one years old. I went to work at first digging holes. While I was with the Telephone Company I worked for other foreman—Mr. Tannally, Mr. Kaher, Mr. Grimsley, another man who was Mr. Lusby's successor and one other man. I worked for first one and then another. I was sent from gang to gang. The ground men under these foreman I have named did about the same sort of work for all of them
10 digging trenches and anchor holes. Sometimes they would have about as many men under them as Lusby had and sometimes not as many. I guess I had dug or helped to dig over 100 of these anchor holes before I was hurt. I have dug them in different places in the District. Whenever a telephone line had to be extended and poles put up they would have to dig these anchor holes. I made no objection to digging the hole which caved in, only I asked for a spoon to spoon the hole to keep out the mud and water. I began to dig the hole with a shovel and to throw the dirt out. I had said nothing to Mr. Lusby about the digging except that it was wet and nasty and he said 'make haste and dig it and get it done and get the block in' When I was about five feet down the water came in so that Lusby tied a rope on to the water bucket and I filled the bucket full of water and he pulled it up and when I was stooping down in the hole, and when he pulled it up he hollered, 'Look out'! I asked for a long handled spoon because there was mud and water in the hole and I didn't want to stand down in the mud and water if I could get out of it.

Thereupon the plaintiff to further maintain the issues on his part joined called a witness JOHN STUDDS, who testified as follows:—

That he had been employed by the defendant company when the plaintiff was hurt and was in Mr. Lusby's gang. That the company was setting some poles, and digging pole holes and digging anchor holes over in Virginia. That he was a mile up the road when the accident happened. That he saw the hole about five o'clock in the evening; that there was about a foot of water in it, or more.

11 That he had made no closer observation of the hole that day.

That he was in the employ of the telephone company about three years as a ground man. That on one side of this hole there was a bank about eight feet high and the hole caved in on the side the bank was on. There was no bracing there before the accident. That while he was on the job Mr. MacKenzie would come over sometimes two or three times a week and then again not for a couple of weeks. Sometimes the places to dig holes were indicated by pegs and sometimes not. That they dug the holes just as the boss showed them and wherever he told them to dig.

Thereupon the witness was asked by counsel the following question:

Q. Can you or not say Mr. Studds, on your practical experience as a ground man, with a hole the size this was, and with water in it to the depth which, you have stated, whether it was safe or unsafe to dig that hole without its being shored?

To the asking of which question, the defendant by his counsel then and there objected and the Court sustained the objection, to which action of the Court the plaintiff, by his counsel then and there excepted, and the exception was duly entered by the Court upon its minutes.

Whereupon the plaintiff to further maintain the issues on his part joined gave in evidence the testimony of WILLIAM J. PATTERSON who testified that at the time of the accident he was working in Virginia for the telephone company and had been for two or three years off and on. That he had dug a good many anchor holes and pole holes. That he did that for a little over a year. That he has

12 had in all about three years' experience digging trenches and holes. That he first saw the hole in which the plaintiff was hurt about seven o'clock the next morning. That the place had all caved in and was nothing but sand and water. There was a big railroad bank by the hole he supposes about eight feet, pretty high up. He knows it was over six feet high. It was a sandy wet place—very wet. Mr. Lusby, the foreman was in charge of the company's work over there.

And thereupon counsel for the plaintiff asked the witness the following question:—

"From your practical experience of three years in digging holes and trenches, and from what you observed as to the physical conditions surrounding this hole on the morning of the day following the accident, was the method of construction used, without shoring, safe or unsafe, in your opinion?"

To the answering of which question objection was made and the following colloquy occurred.

The COURT: It is not so much a question of whether it was safe according to the conditions he observed as it is a question whether it was safe according to conditions that prevailed before the breaking of the bank.

Mr. MATHER: Yes. Of course we would come to that.

The COURT: The physical condition that he observed is not necessarily the physical condition that existed when the cave-in occurred. The objection is sustained.

To which ruling of the Court the plaintiff by his counsel then and there excepted and the exception was there made and entered upon the minutes of the Court.

Whereupon the plaintiff to further maintain the issues on his part joined called as a witness GEORGE BLACKSTEN who testi-
13 fied that he was in the building business until one week ago, and for the last eighteen years has had charge of building work here in the District and in that connection has had a lot of work in the digging of trenches and foundations and such like work.

Thereupon the witness was asked by counsel for the plaintiff the following question:—

"Now assuming Mr. Blacksten, if you please, a hole being dug six feet long, two feet wide and six feet in depth, with a bank on one side of six or eight feet and a coal-yard on the other; and assuming further that this hole had been dug through soil sandy and clayey, with water percolating through the sides and through the bottom, so that when the hole had been dug to a depth of five feet the water was half-way between the foot and one's knee; and assuming further that no shoring or supports or braces had been put in that hole to protect the sides would or would not such a method of construction be safe or unsafe in your opinion?"

To the asking of which question the defendant by its counsel then and there objected and the Court sustained the objection, to which action of the Court the plaintiff by his counsel then and there excepted, and the exception was duly noted by the Court upon its minutes.

This in substance being all the testimony that was offered by the plaintiff as to the happening of the accident the Court on motion of counsel for the defendant directed the jury as follows:

The COURT (Mr. Justice Wright): "Gentlemen of the jury: Oft-times in these so-called fellow-servant cases it appears somewhat dif-
ficult at first impression to harmonize the rule of the law with
14 our own ideas of natural and abstract justice. At first blush one is inclined to say that if an employee is injured through the fault of his foreman, the employer of the foreman ought to respond for that injury. But when you look at it from the other aspect, you have to say to yourself that the employer ought not to be responsible unless the employer is at some fault or other.

Whether the employer is at fault or not depends on whether he has violated any obligation that he owed to the employee who was

hurt. If you will reflect a moment, you will understand, or appreiciate rather, that one who seeks and accepts employment necessarily takes the chances of being injured if there are any chances of injury involved in that employment; and the employer of men is not held to be an insurer of their safety because he employs them to do the very things that carry with them a chance and possibility of injury.

That would bring us to recognize that the employers (the Chesapeake and Potomac Telephone Company) of this plaintiff, Brady, were not under the duty of staying on the ground with him, where he worked, all the time. They did not owe him that duty. The only duty they owed him (inasmuch as the only direct duty that the employer itself discharged respecting this work was to place a foreman in charge of it) was, not to allow a foreman to be over him that they had any reason to believe was an incompetent or an unskilful foreman. If they put in charge a foreman whom they believed to be and who was reasonably skilful, careful, and competent, then they discharge- all the duty that they owed to the men who worked under that foreman; because inasmuch as their work was under a foreman, an incident of it was the taking of chances as to whether that foreman would be careless or not.

Therefore, in that aspect of the case, it would have to be said that the contention of the counsel for the defendant is correct—that this foreman, Lusby, was, in the doing of this particular work, a mere fellow-servant rather than standing in the shoes of the Company itself, towards Brady.

Respecting the other suggestion that is made by counsel for Brady, that it is the duty of an employer to furnish the employee with a reasonably safe place to work; that as a general rule is true enough; but it does not apply to a case of this sort, for this reason: It does not mean that one man cannot employ another to do dangerous work without violating a duty to him. Of course it does not. If that were so, no work that is dangerous could ever be done. What it means is this: That when one is engaged in a business or in an enterprise which is conducted on some particular site, like in a factory or a store or some other particular site, and employs men to work in that site, then the place that he puts them to work in must be a reasonably safe place for them to work in. It does not at all mean that when a man has dangerous work to do he must make dangerous work safe for people to work at. That is out of the question. That is impossible.

Therefore, inasmuch as the plaintiff has not proven that the defendant, this Telephone Company, has violated any duty that it owed to him as one of its employees, there cannot be any recovery against it; and you may render a formal verdict for the defendant.

(By direction of the Court the jury thereupon returned a verdict in favor of the defendant.)

Thereupon before the jury had returned its verdict counsel for the plaintiff prayed the Court to sign and seal this his bill of exceptions which was accordingly done nunc pro tunc this 3rd day of November, 1909.

DAN THEW WRIGHT,
Justice.

Directions to Clerk for Preparation of Transcript of Record.

Filed Nov. 4, 1909.

In the Supreme Court of the District of Columbia, the 4 day of November, 1909.

At Law. No. 50664.

JOHN E. BRADY
vs.
CHESAPEAKE & POTOMAC TELEPHONE COMPANY, a Corporation.

The Clerk of said Court will please include in Transcript of Record on appeal to the Court of Appeals in the above case; Declaration; Plea; Joinder of Issue; Mem. of verdict; Judgment; Memorandum of Appeal Bond; Bill of Exceptions.

LEONARD P. MATHER,
Attorney for Plaintiff.

17 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 16 both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 50664 at Law, wherein John E. Brady is Plaintiff and Chesapeake & Potomac Telephone Company, a corporation is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 17th day of November 1909.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2088. John E. Brady, appellant, vs. Chesapeake and Potomac Telephone Company, a corporation. Court of Appeals, District of Columbia. Filed Nov. 19, 1909. Henry W. Hodges, clerk.

IN THE

Court of Appeals of the District of Columbia

JANUARY TERM, 1910

No. 2088

JOHN E. BRADY, APPELLANT,

vs.

CHESAPEAKE AND POTOMAC TELEPHONE COMPANY, A CORPORATION

BRIEF FOR THE APPELLANT

LEONARD J. MATHER,
Attorney for the Appellant.

IN THE

Court of Appeals of the District of Columbia

JANUARY TERM, 1910

No. 2088

JOHN E. BRADY, APPELLANT,

vs.

CHESAPEAKE AND POTOMAC TELEPHONE COMPANY, A CORPORATION

BRIEF FOR THE APPELLANT

Statement of the Case

This is an action on the case brought by appellant to recover damages for injuries negligently caused him by appellee, the Chesapeake & Potomac Telephone Company, while in its employ as a groundman.

Ordered by appellee's foreman Lusby to dig an anchor-hole in ground that was dangerous, appellant obeyed, and was hurt by one of the sides of the hole caving in upon him.

The declaration charges, in effect, that the defendant company (appellee) was negligent in ordering and directing the plaintiff (appellant) to dig one of its anchor-holes through ground which it knew, or should have known, to be

dangerous, without shoring up or supporting its sides to make this working place reasonably safe.

The proof showed that appellee was extending its telephone lines over in Alexandria County, State of Virginia—digging holes, erecting poles and securing or anchoring them—and that its said work, at which appellant was hurt, was in charge of foreman Lusby, who controlled six laboring men, of which appellant was one. (R. 5, 7.) Appellant was thirty-one years of age, and up to three or four o'clock of April 2, 1908, when the accident happened, had been working for appellee for nearly three months. Lusby, the foreman, had set appellant to work on this particular anchor-hole which caved in, and he remained right there the whole time appellant was digging it. These anchor-holes had to be dug about two feet wide, six feet long and six feet deep, and the hole where appellant was injured was placed right at the side of a six or eight-foot railway embankment in ground that was sandy and wet, through which there percolated water from the sides and bottom of the hole as it was being sunk, until, when a depth of some five feet had been reached, the water stood over appellant's shoe tops and half-way from his ankles to his knees (R. 5), while the next morning, at seven o'clock, the place had all caved in, and was nothing but sand and water. It was a sandy wet place, very wet. (R. 7.) Appellant did not think his work was dangerous, athough the sides of the hole were not shored or braced at all, because his foreman was there all the time, who not only failed to warn him of any danger, but urged him on in the digging, saying in response to appellant's complaint about its being so wet and nasty, "Oh, make haste and dig it and get it done and get the block in" (R. 6); and, furthermore, because appellant had already dug, or had helped to dig, without accident, over a hundred of these anchor-holes in different places in

the District; for whenever a telephone line had to be extended, and poles put up, the Company would have to dig these anchor-holes along its line of extension. (R. 6.) Suddenly, and without warning, as appellant was stooping over in this anchor-hole, having then dug it down to a depth of something over five feet, the side next the railway embankment caved in on him and permanently injured his shoulder, as he has a knot there now that feels like a string right across it, which prevents the free use of that arm or heavy or laborious work with it. (R. 6, 7.)

At the close of the plaintiff's case, a verdict for the defendant was directed, and this appeal is prosecuted to correct the error.

Assignment of Error

That the trial court erred in withdrawing the case from the jury and directing a verdict for the defendant.

Argument

In considering this case, two questions naturally present themselves for review.

First, Whether the risk appellant ran when obeying the order of his foreman to dig the anchor-hole in which he was hurt, was one incident to his employment as a groundman for the appellee telephone company, or was so open and obvious as that the danger therefrom was apparent, and therefore *assumed* by him, and

Second, Whether appellee's foreman Lusby was the fellow-servant of appellant in providing the place, and directing how the anchor-hole that caved in upon appellant should be dug.

There was no question raised at the trial as to the negligence in causing this anchor-hole to be dug alongside of this eight-foot railway embankment, and through the soft, sandy and wet ground thereabouts, without shoring up the sides of the hole as it was being sunk; and I take it nothing further need be said thereon, save to add that, whether negligence be conceded or not, matters little, for the law would so adjudge, *prima facie;* and that appellee's forman Lusby knew the danger he was forcing upon appellant, as he drove him to complete the digging of this hole, is only too apparent.

I.

First, then, as to whether appellant assumed the risk of this anchor-hole caving in upon him when digging it as ordered and directed by his foreman.

An employee may take it for granted that the place which is provided by his master for him to work in is a reasonably safe one; and he neither assumes the risk of his master's negligence (unless so open and obvious as that the danger therefrom is apparent); nor the necessity of looking or hunting for defects or possible sources of danger.

Ry. v. Archibald, 170 U. S., 665, 672.
Ry. v. McDade, 191 U. S., 64, 68.
Ry. v. Swearingen, 196 U. S., 51, 62.
Kreigh v. Westinghouse & Co., 214 U. S., 249.

Evidently it was not a risk incident to appellant's employment as a groundman, for he had safely dug over a hundred of these anchor-holes in other places.

Was it, however, such an open and obvious risk as that the danger must have been apparent to appellant? Hardly, for in determining the question of obviousness, every reasonable inference must be drawn in favor of the party

against whom a peremptory instruction is requested. Appellant himself tells us he suspected no danger, and there was not only the order of his foreman to do this work, but as well the presence of his foreman as he directed and urged the work to completion. There was no warning, and hardly could there have been any apprehension of danger. What other thought would be likely to enter a laborer's mind, save to carry out his master's instructions, unless the danger was open and glaring; for is not his primary duty one of obedience to the authority he respects and relies upon?

This doctrine is well illustrated in the case of Railway *vs.* Ward, 90 Va., at pages 687, 691 and 692. In this case, the plaintiff was ordered by his boss or foreman to dig a groundhog hole, with sides unsupported, and in carrying out that order, the sides of the hole caved in on him.

The court said:

> "When the servant acts under the orders of his master, and is injured * * * it cannot be said with any degree of reason, that the master and servant stand on equal footing, even though they have equal knowledge of the danger. The servant occupies a position of subordination and may rely upon the skill and knowledge of his master, and is not free to act on his own suspicions.
>
> If, therefore, the master orders the servant into a situation of danger, and he obeys, and is thereby injured, the law will not deny him a remedy against the master on the ground of contributory negligence, unless the danger was so glaring that no prudent man would have entered into it, even, when, like the servant, he was not entirely free to choose."

Again, in Haley *vs.* Chase, 142 Mass., 316, 322 and 323, where a teamster was ordered to drive his team under a gateway, and in so doing was injured, it was held:

> "The test is not only what each knew, but what each reasonably ought to have known concerning the risk; and we cannot say that identically the same duty rested on the servant and on the master seasonably to ascertain the extent of the danger involved in performing the work in the manner ordered by the master. * * * The servant's attention must be principally directed to the performance of the work in the manner in which he is ordered to perform it, and he may be in a less favorable position to see and judge of the surrounding dangers; and when he is suddenly called upon to perform a piece of work in a particular manner, under the eye of his employer, he may not reasonably have time for the most careful observation."

This principle has been applied in numerous cases, bringing up the question under a variety of different circumstances. The following are some of these:

> Keegan v. Kavanaugh, 62 Mo., 230, 232, 233.
> Brick Co. v. Sobkowiak, 34 Ill. App., 312, 319.
> Miller v. Ry., 12 Fed. Rep., 600, 602, 603.
> Bartolomeo v. McKnight, 178 Mass., 242, 245, 246.
> Stephens v. Ry., 96 Mo., 207, 212.
> Moline Plow Co. v. Anderson, 19 Ill. App., 417, 420.
> Coan v. City of Marlborough, 164 Mass., 206.
> Walker v. Scott, 8 Am. Neg. Rep., 405.
> Lynch v. Allyn, 160 Mass., 248.
> Hennessy v. City of Boston, 161 Mass., 502.
> Shortel v. City of St. Joseph, 104 Mo., 114, 120.
> Ry. v Bourman, 212 U. S., 536.

It is plain, therefore, that appellant could not be held, as a matter of law, to have assumed the risk of the appellee telephone company's negligence in failing to shore up the sides of this anchor-hole, as it was being sunk in the dangerous ground, which it was bound by law to provide, and which it had furnished appellant for this purpose.

II.

Has the fellow-servant doctrine any proper application to this case?

While the authoratative source of this doctrine as enunciated by Mr. Chief Justice Shaw in the celebrated case of Farwell v. Boston & W. R. Corp., is of but comparatively recent date, as years mark the cycle; yet the question has been such a vexed one, and has produced such a contrariety of legal opinion throughout the courts of the country, both State and Federal, as to render it a physical impossibility to examine the question at all comprehensively or even systematically in this brief.

Judge made law in its inception, it has since remained entirely the creature of the courts.

Methought the question in this jurisdiction, though, had been settled by this Court in Carter v. McDermott (29 App., D. C., 145), but the learned trial Justice considered otherwise.

It is interesting to note in this connection that it was held below that the inalienable and non-delegable duty of the master to furnish his employes with a reasonably safe place in which to work, only extends to "a business or an enterprise which is conducted on some particular site, like a factory or a store or some other particular site." It is somewhat difficult to determine just the distinction sought: Whether it be one thing when done under roof, and another when the sky serves as the only canopy overhead; or whether it be meant that the rule upon the master is imperative in town and city, while in the country it is inapplicable. Or is it that the dangerous character of the work is to serve as the distinguishing mark of the master's duty, and the question, after all, is one merely of degree? In other words, if dangerous work is being performed by the master, the law imposes *no* duty upon him to care for his employes.

Only where the work is not dangerous, and there is relatively the less reason for care, does the law impose any obligation upon the master in this regard. Is that what is meant?

Mr. Justice Brewer said in Patton v. Ry.. 179 U. S., 658, 664:

> "The greater the risk which attends the work to be done and the machinery to be used, the more imperative is the obligation resting upon him." (The master.)

It is laid down in 26 Cyc., 1117, that

> "Where a servant is employed in a mine, quarry, tunnel, pit, trench or other excavation, the master owes him the duty to use ordinary and reasonable care and diligence to make his place of work as reasonably safe as the nature of the work admits of."

Again, it was said that the only duty (the telephone company) owed appellant, "was not to allow a foreman to be over him that they had any reason to believe was an incompetent or an unskilful foreman."

Similarly, this was urged by counsel for the railway company in the Holmes case, reported in 202 U. S., at pages 438, 441, (in which it was held, overruling the Dixon case in 194 U. S., that the negligence of a train dispatcher causing a collision, was the master's negligence, and not that of a fellow-servant; for the master's duty to furnish a safe place was a continuing, personal duty which could not be delegated), but the Court in that case very quickly put a quietus on the contention, saying:

> " 'There is no ground!' " it is insisted " 'either upon reason or authority for holding that a principal is bound to stand over his servants to enforce proper and sufficient orders once given to them.' "

"There is an instant answer to the contention. Instead of according with principle and authority, it is opposed to both. It contradicts a concession elsewhere made in the argument, that it is the duty of a railroad company to promulgate adequate rules and regulations for the safety of employes engaged in the dangerous duty of operating trains, and at times telegraph orders for the movements of trains. It is the duty of a master to furnish safe places to work in and safe instruments to work with, and of this there need be no discussion. The duty is a continuing one and must be exercised whenever circumstances demand it. * * * But something may occur to one of the trains, with or without fault of anybody, which may endanger the other. May a train dispatcher know it and not guard against it?

A negative answer would be revolting.

A master must furnish a safe place for his servant to work in, and the risk the servant assumes of the negligence of a fellow-servant, does not exempt from that duty."

As well might it be held,—if every case where damages were sought for injuries received by an employe, because of his master's negligence, was limited to such a rule,—that there never could be a recovery; for does it not go without saying, that reprehensible as is now the conduct of these corporations with regard to human life and suffering, there would be an utter and reckless abandon and disregard of all care, if consequences were thus to be frittered away.

We all know that corporations have to act through its agents and servants, and if to bring home knowledge of some carelessness on the part of the higher official life of this artificial being, in engaging or hiring those of lesser degree, were necessary, the proof would never be forthcoming. The master would see that it was kept safely locked away from reach.

Fortunate it is, then, that side by side with this fellow servant doctrine, as, at the beck and call of the master, it has blossomed and expanded until it has reached out into the very vitals of the laboring man, there have arisen a number of exceptions which have kept pace with the growth of the doctrine itself, so as to bulwark and protect human life and limb, or, at least, to render necessary pecuniary compensation therefor.

Among the established exceptions to the general rule as to the non-liability of the common employer to one employe for the negligence of a coemploye in the same service, is one which arises from the obligation of the master not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master.

Hough v. Ry., 100 U. S., 213.
Ry. v. McDaniels, 107 U. S., 454,459.
Gardner v. Ry., 150 U. S., 349,359.

While it is true that the Supreme Court of the United States has decided that the fellow servant doctrine was, or was not, applicable, on occasion, upon "the department theory" of reasoning; yet of late, the decisions have rather turned on "the character of the act complained of," without regard to the grade of service, and this, undoubtedly, is the better and more philosophical method for testing the applicability of the rule.

Appellant's injury was the natural and probable consequence of appellee's negligence in failing to shore up and safeguard the working place in this anchor-hole; when it knew, or could reasonably have anticipated, the direful consequences that would follow in sinking this hole through such very wet and sandy ground, adjacent, as it was, to the

eight-foot railway embankment, with all its added weight on the side that caved in upon appellant.

It will be observed that this is not the case of a servant being employed to do a piece of work which may be dangerous or not according to the way the laborer does it, but the work that appellee wanted done, and ordered appellant to do through its foreman Lusby, necessarily was dangerous, unless the sides of this anchor-hole were braced as the hole was sunk.

The primary duty of providing a place reasonably safe for sinking this anchor-hole, was placed upon appellee by the law.

It shirked its responsibility, and therein was it negligent.

In Railway v. Baugh, 149 U. S., 368,387, the engineer and the fireman of a locomotive engine running alone on a railroad were held to be fellow servants, and this because it was clearly the negligence of the engineer that caused the injury; for there was no failure on the master's part to furnish either place or machinery that was reasonably safe for use. Mr. Justice Brewer, who delivered the opinion in the case, said:

> "Again a master employing a servant impliedly engages with him that the place in which he is to work and the tools or machinery with which he is to work, or by which he has been surrounded, shall be reasonably safe. It is the master who is to provide the place, and the tools and the machinery, and when he employs one to enter into his service, he impliedly says to him that there is no danger in the place, the tools and the machinery than such as is obvious and necessary. Of course some places of work, and some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity and cannot be obviated. But within such limits, the master who provides the place, the tools and the

machinery, owes a positive duty to his employee in respect thereto. That positive duty does not go to the extent of a guarantee of safety, but it does require that reasonable precautions be taken to secure safety, and it matters not to the employee by whom that safety is secured, or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself sees fit to have it attended to by others, that does not change the measure of obligation to the employee, or the latter's right to insist that reasonable precautions shall be taken to secure safety in these respects. Therefore it will be seen that the question turns rather on the character of the act, than on the relation of the employees to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of his positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor."

An employer, therefore, cannot transfer or delegate to a servant a duty required of *him* for the safety and protection of his servants, so as to exonerate *himself* from liability for injuries caused to another servant by the neglect or omission to perform this duty.

The duty to furnish a reasonably safe place is an absolute, positive, personal and continuing one, and the risk the servant assumes of the negligence of his fellow servants, does not contemplate the assumption of the master's negligence in failing in its performance.

Fastened by the law upon the master, *his* the duty, for a breach of which he is held strictly accountable. This duty is inalienable and non-assignable, and if there be any negligence, it is immaterial whether such negligence be his own, or that of his servant; as such servant, no matter what his

grade or position in the master's service, is the *alter ego* of the master himself.

Railway v. Holmes, *supra.*

In Railway v. Herbert, 116 U. S., 642, 647, 648, a brakeman was ordered by his yardmaster to stop with the brakes two cars, which had been switched upon a track in the yard. He attempted to obey and was injured by reason of the defective brakes.

Mr. Justice Field, after stating the general doctrine relating to fellow-servants, said:

> "It is equally well settled, however, that it is the duty of the employer to select and retain servants who are fitted and competent for the service, and to furnish sufficient and safe materials, machinery, or other means, by which it is to be performed, and to keep them in repair and order. This duty he cannot delegate to a servant so as to exempt himself from liability for injuries caused to another servant by its omission.
>
> "Indeed, no duty required of him for the safety and protection of his servants can be transferred, so as to exonerate him from such liability. The servant does not undertake to incur the risks arising from the want of sufficient and skilful co-laborers, or from defective machinery or other instruments with which he is to work.
>
> "His contract implies that in regard to these matters his employer will make adequate provision that no danger shall ensue to him."

Likewise in Gardner v. Railway, 150 U. S., 349, 359, Mr. Chief Justice Fuller said:

> "In Hough v. Railway Co., 100 U. S., 213, where the injury was the result of defective appliances, it

was held that, to the general rule exempting the common master from liability to a servant for injuries caused by the negligence of fellow-servants, there are well-defined exceptions, one of which arises from the obligation of the master not to expose the servant when conducting his business to perils, from which they may be guarded by proper diligence on his part.

"While it is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages for compensation, among which are the carelessness of his fellow-servants with whose habits, conduct and capacity he has in the course of his duty an opportunity to become acquainted, and against whose neglect and incompetency he may himself take precautions, it is equally implied in the same contract that the master shall supply the physical means and agencies for the conduct of his business, and that he shall not be wanting in proper care in selecting such means."

Mr. Justice Brewer in McCabe & Steen Co. v. Wilson, 209 U. S., 275, 280, held that a fireman on an engine of a construction train was not a fellow-servant of the foreman of a gang constructing a nearby bridge which fell and caused the accident.

> "It is the duty of the employer," said he, "to provide a suitable and safe place for the employees to work, and they are not charged with any responsibility in regard thereto; and while the employer is relieved if he does everything that prudence requires in that respect, it is largely a question of fact." * * * "These latter employees (speaking of the men working on the bridge) represented the principal in an entirely different line of employment from that in which the plaintiff was engaged, were discharging a positive duty of the master to provide a safe and suitable place and structures in and upon which its

> employees were to do their work—Ry. v. O'Brien, 161 U. S., 451, and cases cited in the opinion,—and in discharging that positive duty they and not he were the representatives of the defendant. Their action, so far as that work was concerned, was the action of the defendant."

In Kreigh v. Westinghouse & Co., 214 U. S., 249, a foreman bricklayer while at work upon the wall of a building, was knocked from his position and injured by the negligent handling of a swinging bucket attached to a derrick by a boom and guy ropes, and it was held:

> "It is the duty of the master to use reasonable diligence in providing a safe place for his employees to work in and to carry on his business; and the employee may, in the absence of notice to the contrary, assume that the master will use reasonable care in furnishing appliances for carrying on the business.
>
> "The duty of the master to provide safe place and appliances for his employees is a continuing one, and must be exercised whenever circumstances demand it, and this applies where the workmen are engaged in work more or less dangerous, and it is only a mater of using due skill and care to make the place safe. There is no reason why an employee should be exposed to dangers unnecessary to the proper operation of the business of his employer."

A very interesting as well as instructive case is that of Manuel v. The Mayor, etc., of City of Cumberland, which decided by the Court of Appeals of Maryland, in June, 1909, is very similar to the one at bar in its facts, as well as in the determination of the question as to whether the fellow-servant doctrine was applicable. A sewer trench was being dug under the supervision of the foreman of the city sewer works, who was in turn under the street superintendent and city engineer. Plaintiff was a laborer en-

gaged with other workmen in digging this trench. The sides unbraced and unsupported caved in upon plaintiff where a gas main was located close to the trench, badly injuring him. The trial court directed a verdict for the defendant, which was reversed on appeal, the court holding:

> "A city employing men to dig a sewer trench under the supervision of the foreman of the city sewer works, under the superintendent and the city engineer, must so locate the whole course of the trench that it will not be unsafe *by reason of its method of construction,* or its proximity to any object which may reasonably be expected to create danger in the performance of the work, otherwise safe; and the city, chargeable with knowledge of the location of a gas main close to the trench as located, must inform the foreman thereof, so that he may take the necessary steps to protect the men from danger.
>
> "Where, in the digging of" this trench, "it becomes necessary to dig through ground which, by reason of its condition, a competent foreman would see should be braced to secure the safety of the men, the city cannot escape liability for injury to the men by the caving of the ground because not braced by proving that it used due care in the selection of a competent foreman."

The Court further said in passing upon one of the instructions granted the defendant by the trial court:

> "The defendant's third prayer was misleading because it was calculated, and indeed intended, to lead the jury to believe that the whole question was one of the negligence of a fellow-servant; whereas, as we have seen, *the vital question is one of the omission of a positive duty of the master, which cannot be delegated so as to avoid liability for neglect.*"

After a very thorough review of the authorities on this fellow-servant doctrine by Mr. Justice Robb, in Carter v.

McDermott, 29 App. D. C., 145, where the question was whether the negligence of a conductor to equip his car with a lamp, duly supplied by the street railway company, whereby a collision resulted, and another co-servant was injured, was the continuing personal negligence of the railway company, or the negligence merely of a fellow-servant, the Court went on to say:

> "The duty of equipping its cars with such light is an imperative duty resting upon the company, and one which it cannot delegate so as to escape liability for injuries suffered by a servant by reason of the omission or neglect on the part of the agent or servant entrusted therewith.
>
> The failure of the conductor to equip his car with the light was the failure of the company, for the consequences of which the company is responsible.
>
> When Carter engaged with the company as one of its mortormen, he assumed, as previously stated, the ordinary and natural risks incident to the employment, among which was the risk of the trolley pole jumping the wire, provided such an occurrence should not be due to faulty construction, the risk of a fellow-servant's failure to light a signal lamp, or the risk of a fellow motorman's carelessness in backing a car into his; but he did not assume the risk incident to the lack of necessary and proper appliances on his own and other cars, including signal lamps."

Conceding, however, for the sake of argument, that foreman Lusby was a fellow-servant to appellant, in so far as his order to appellant to dig the anchor-hole in question is concerned; yet, notwithstanding this, there was the primary obligation on appellee to furnish the reasonably safe place for appellant to work in, and in this selection, whether actually performed by Lusby, or located by appellee, the duty was personal to appellee, and hence concurred with

Lusby's own negligence in contributing to the injury. In other words, appellee's failure to provide a reasonably safe place in which to sink this anchor-hole, whether concurring with the negligence of Lusby in forcing the digging of the hole without warning or not, was such an efficient cause of the injury, as to make appellee's negligence necessary to be passed upon by a jury.

In Railway v. Cummings, 106 U. S., 700, an engineer sustained injuries by reason of a collision with another train of the same company, and it was held:

> "That the trial court did not err in charging the jury that the company, if its negligence had a share in causing the injuries of the plaintiff, was liable notwithstanding the contributory negligence of his fellow-servant."

Likewise was it said in Deserant v. Railway, 178 U. S., 409, which was an action brought to recover damages for an explosion in a mine:

> "It is undoubtedly the master's duty to furnish safe appliances and safe working places, and if the neglect of this duty concurs with that of the negligence of a fellow-servant, the master has been held to be liable."

Again in Railway Co. v. Lyon, 203 U. S., 465, a brakeman on a freight train lost his life on a spur track, which stopped at a trestle with a buffer at the end, not calculated to resist a car pushed by an engine, but only to stop one pushed by hand, or by the wind. The engineer in charge of the train operated his engine so as to push the cars against the buffer with such violence as to break the buffer away, and precipitate the brakeman down into the canon which was there, and it was held in this case that:

> "Where the negligence of the master in not supplying proper appliances has a share in causing injuries to an employe, the master is liable, notwithstanding the negligence of a fellow-servant, who may have contributed to the accident."

So, too, in Wilmington Mining Company v. Fulton, 205 U. S., 60, 75, the same doctrine was upheld. In this case, the injury was caused by an explosion of mine gas.

Mr. Justice White, who delivered the opinion, said:

> "Where two concurring causes contribute to an accident to an employe, the fact that the master is not responsible for one of them does not absolve him from liability for the other cause, for which he is responsible."

Similarly, in Kreigh v. Westinghouse & Co., 214 U. S., 249, it was held:

> "That where the negligence of the master in failing to provide and maintain a safe place contributes to the injury of the employe, the master is liable notwithstanding the concurring negligence of those performing the work."

This Court in Standard Oil Co. v. Brown, 31 App., D. C., 371, held:

> "The negligence of a fellow-servant will not relieve the master from liability where there is evidence from which the jury can find the master was guilty of negligence, and that its negligence contributed to the injury."

From a perusal of these cases it is plain that no matter whether Lusby was a fellow-servant to appellant in all save the actual providing or furnishing of the safe place;

yet, in this regard at least, inasmuch as this is a personal, non delegable duty, appellee was negligent if a dangerous place was chosen, whether the actual selection was made by Lusby, or determined upon by the telephone company in advance of sending its men there to perform the manual work.

The test must always be whether the negligent act or omission was in discharge of the master's or servant's duty.

It is well known that appellee's poles have to be set a certain distance apart, and before placed, right so to do must be obtained. It is only reasonable to suppose that the telephone company, extending its line, determines upon the course and line of its route, if not actually determining just where each and every hole has to be located and dug. So, in having this anchor-hole sunk in the wet and sandy ground adjacent to the eight-foot railway embankment, without having its sides shored and supported, was such negligence as should make appellee responsible for the injury thereby caused.

Appellee knew it was extending its line, knew that its men were going out in Virginia for this purpose, knew, or should have known, that some of its holes which were to be dug there lay among dangerous places; was it asking too much, then, for the safety of life and limb of those to whom it meant daily subsistence of self and family—bread and butter—to so supply and instruct the foreman as that he would shore up and protect when occasion required it? True, there would be the cost of a few boards; true the work could not be rushed through quite so rapidly; but much of suffering and want and privation would thereby be saved.

While, of course, the master is never liable when, furnishing originally fit and proper place and appliances for use, they afterwards become unfit through the transitory

and momentary negligence of the servant. Then there is no personal wrong done by the master; nothing left undone by him that he should have done in the exercise of ordinary prudence and care. It is the negligence of the instant, making, as it does, the independent and improper act of the servant, rather than anything the master could properly have guarded against.

So, always the real test is whether the negligence is in the supplying of a reasonably safe place; or in making unsafe what originally was properly provided. Whether what has been supplied, when putting it to its ordinary and intended use, creates the danger; or the improper manner of its use brings about the result complained of. Whether the negligence be in *design*, or *execution*.

In this case it was the duty of appellee to provide the place, and when it furnished ground, which put to its intended use, was dangerous, therein was it at fault; therein was it negligent.

From the above review of the facts and law in this case, it is plain that there was no assumption of risk by appellant, as a matter of law; neither is the fellow-servant doctrine properly applicable to it.

It is accordingly urged that the judgment of the lower court should be reversed, and this case remanded for a new trial.

LEONARD J. MATHER,
Attorney for the Appellant.

Henry W Hodges
Clerk.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1910.

No. 2088.

JOHN E. BRADY, APPELLANT,

vs.

CHESAPEAKE AND POTOMAC TELEPHONE COMPANY.

BRIEF OF APPELLEE.

R. ROSS PERRY,
R. ROSS PERRY, JR.,
Attorneys for Appellee.

THE LAW REPORTER PRINTING CO., WASHINGTON, D. C.

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BRIEF OF APPELLEE.

A.

Concise Statement of Facts.

The appellee filed his declaration in trespass on the case in the Supreme Court of the District of Columbia on June 11, 1909. In it he charged that on April 2, 1908, he was employed by the appellee company and, at the time of his injury, was engaged in digging holes for telephone poles for it in Virginia; that on that day, while digging an anchor hole, he was ordered by a foreman of the appellee to get in the hole and dig it to a depth of

six feet; that before he had finished digging the hole the bank fell in and he was injured thereby; that the appellee, through its foreman, was guilty of negligence in not shoring up the hole and in not furnishing the appellant a safe place in which to work. The amount claimed in the declaration was $5,000 (Rec., pp. 1, 2).

To this declaration the appellee pleaded the general issue and issue was joined thereon. The cause came to trial on October 6, 1909, and the jury, by direction of the court, returned a verdict for the defendant. Judgment was rendered upon the verdict and an appeal from the judgment taken to this court (Rec., pp. 3, 4).

As the record shows (p. 8), the verdict was directed for the appellee upon the close of the appellant's case. The appellant testified that he first applied to work for the appellee to a Mr. McKenzie about the 1st of January, 1908. He afterwards went to the office of the company and McKenzie gave him a job as a "ground man." In this capacity he worked for about six foremen in all. He was sent from gang to gang, going first with one foreman and then with another. A man named Lusby was the foreman of the gang doing the work in Alexandria County and had six men, including the appellant, under him. The other foremen under whom he had worked sometimes had as many men under them as Lusby had and sometimes fewer.

He always worked for the appellee as a ground man. His duty as such was to do anything required on the ground, including digging holes. He was sent to work for Lusby in Alexandria County for two weeks by McKenzie. McKenzie was in charge of the work over there and Lusby was a foreman under him. Before the appellant was hurt he had dug or helped to dig during his employment by the appellee over one hundred anchor holes. He was hurt while digging an anchor hole between 3 and 4 o'clock on April 2, 1908. The hole was to be

about two feet wide, six feet long and six feet deep, and was dug right beside a bank of a railroad. One side of the bank was about six feet higher than the hole. The foreman Lusby sent him to work at this hole and was right around the hole while he was working. After he had dug down a little, water came in from the bottom and the sides. The ground was a mixed soil—a little clay and sandy. At the time the bank caved in the hole had been dug about five feet deep and the water was half way between his ankle and knee. The hole was not shored up at all. He did not think it was dangerous to dig there and no one told him it was (Rec., pp. 5, 6).

The testimony of the appellant as to the extent of his injuries and his wages before and since his injury are briefly set forth in the record (pp. 5, 6), but are not material to this appeal.

In addition to himself, the appellant produced as a witness John Studds, who testified that he was in Lusby's gang, but was not present at the time of the accident, and did not see the hole until about 5 o'clock that evening, when there was a foot or more of water in it; that he made no closer observation of the hole that day; that on one side of it there was a bank about eight feet high, and that the hole caved in on the side the bank was on. That while he was on the job McKenzie would come over sometimes two or three times a week and then not again for a couple of weeks; that sometimes the places to dig holes were indicated by pegs and sometimes not; that they dug the holes just as the boss showed them and wherever he told them (Rec., p. 7).

The appellant further introduced the testimony of William J. Patterson, who testified that at the time of the accident he was working in Virginia for the appellee and had worked for it two or three years off and on; that he had had in all about three years' experience digging trenches and holes; that he first saw the hole in which the

appellant was hurt about 7 o'clock the morning after; that the place had all caved in and was nothing but sand and water. There was a railroad bank about eight feet high—certainly over six feet—by the hole. It was a sandy place—very wet. Mr. Lusby was the foreman in charge of the company's work over there (Rec., p. 7).

The only other testimony was that of George Blacksten to the effect that for the past eighteen years he has had charge of building work and in that connection has had considerable experience in the digging of trenches and foundations and such like work (Rec., p. 8).

B.

Arguments on the Law.

The only exceptions taken by the appellant were to the action of the court, sustaining the objections of the appellee to the asking of the following questions of witnesses whose testimony has been mentioned above:

1. The following question asked of John Studds (Rec., p. 7):

> Q. Can you or not say, Mr. Studds, on your practical experience as a ground man, with a hole the size this was, and with water in it to the depth which you have stated, whether it was safe or unsafe to dig that hole without its being shored?

2. The following question asked of William J. Patterson (Rec., pp. 7, 8):

> Q. From your practical experience of three years in digging holes and trenches, and from what you observed as to the physical conditions surrounding this hole on the morning of the day following the accident, was the method of construction used, without shoring, safe or unsafe, in your opinion?

3. The following question asked of George Blacksten (Rec., p. 8):

> Q. Now assuming, Mr. Blacksten, if you please, a hole being dug six feet long, two feet wide and six feet in depth, with a bank on one side of six or eight feet and a coal yard on the other; and assuming further that this hole had been dug through soil sandy and clayey, with water percolating through the sides and through the bottom, so that when the hole had been dug to a depth of five feet the water was half way between the foot and one's knee; and assuming further that no shoring or supports or braces had been put in that hole to protect the sides, would or would not such a method of construction be safe or unsafe in your opinion?

In view of the opinion and ruling of the court it becomes unnecessary to deal with these three questions which were ruled out. Their only pertinency could be to produce evidence tending to show that the hole in which the appellant was injured should have been shored or braced. It is here admitted, as the lower court held in its opinion (Rec., pp. 8, 9) that there was evidence sufficient to show that the hole should have been shored or braced. That being admitted, the only question raised before the court and the only question decided by the court was that the negligence, if any, was that of a fellow-servant of the appellant for which the appellee is not at law answerable. There was no evidence tending to show, as the court pointed out in its opinion, that the appellee had any reason to believe that the foreman was incompetent or unskillful. The appellee, therefore, having, so far as the evidence shows, placed a competent foreman over the appellant and there being no evidence

to show that it did not provide suitable material and appliances for the work in hand it could not be held responsible for the negligence of the foreman, if any, in the case in question. Even should the court have been mistaken in its propositions of law, yet the appellant could not avail himself of such error, as no exception was taken to the action of the court in directing the verdict in this case or to any proposition of law upon which the court based its action in so directing a verdict. It is submitted, however, that the action of the trial court in directing a verdict for the defendant was proper as matter of law.

(*a*) That the appellant and the foreman Lusby were fellow-servants, and that under the circumstances of this case the appellant can not recover for the negligence of Lusby, is shown by the following cases:

Wright *vs.* R. R. Co., 80 Fed. Rep., 260.
Bourman *vs.* R. R. Co., 212 U. S., 541.
R. R. Co. *vs.* Keegan, 160 U. S., 259.
Alaska Mining Co. *vs.* Whelan, 168 U. S., 86.

In these cases there was evidence to show the servant was ordered by the foreman to do the act in the performance of which he was hurt.

R. R. Co. *vs.* Peterson, 162 U. S., 346.
R. R. Co. *vs.* Conroy, 175 U. S., 323.

Both of these cases deal exhaustively with the principles involving the relation of master and servant. In the Peterson case the foreman had power to hire and discharge the hands who composed the gang, and had exclusive charge of their direction and management in all matters connected with their employment.

R. R. Co. *vs.* Dixon, 194 U. S., 338.

(*b*) The duty of a master to provide a safe place to work does not apply where the servants are themselves making the place, and its safety depends upon the due performance of their work by them and their fellows.

Armour *vs.* Hahn, 111 U. S., 313.
Oleson *vs.* Mining Co., 115 Iowa, 74.
Coal Co. *vs.* Admr. of Clay, 51 Ohio St., 542.

(*c*) The following cases are sufficient authority for the fact that where servants are making excavations the duty of the master is performed by providing suitable materials.

Floyd *vs.* Sugden, 134 Mass., 563.
Dube *vs.* Lewiston, 83 Me., 211.
Durst *vs.* Steel Co., 173 Pa. St., 162.
Dwyer *vs.* Hickler, 16 N. Y. Supp., 814.
Bergquist *vs.* Minneapolis, 42 Minn., 471.
Brown v. Gas Co. 81 Vt. 477; 22 L.R.A. (N.S.) 173

(*d*) The reasoning in the above cases show that the burden of proof is upon the plaintiff to show that the defendant failed to provide suitable material for the safe prosecution of the work. If there is no evidence to prove such failure the plaintiff can not recover on that ground.

Zeigler *vs.* Day, 123 Mass., 152.

(*e*) The doctrine of res ipsa loquitur has no application to this case.

Patton *vs.* R. R. Co., 179 U. S., 658.

(*f*) It is submitted that the above discussion of legal principles is unnecessary, as it is evident from the face of the record that no exception was taken to the direction of a verdict for the defendant by the court. It

further is evident from the face of the record that no exception taken by the plaintiff during the progress of the trial dealt with the evidence which governed the court in directing a verdict for the defendant.

The court will look at the whole record to see on what grounds the court directs a verdict and whether its action is excepted to by an appellant.

Michigan Ins. Bank *vs.* Eldred, 143 U. S., 293.

It is submitted that the action of the trial court in directing a verdict for the defendant should be affirmed.

R. ROSS PERRY,
R. ROSS PERRY, JR.,
Attorneys for Appellee.